

REMARKS

Claims 1 through 4 and 6 through 13 are pending in this application. Claims 1, 6, 7, and 10 through 13 have been amended, and claim 5 cancelled. Care has been exercised to avoid the introduction of new matter. Indeed, adequate descriptive support for the present Amendment should be apparent throughout the originally filed disclosure. Applicant submits that the present Amendment does not generate any new matter issue.

Claims 10 through 13 were rejected under 35 U.S.C. § 101.

In the statement of rejection the Examiner asserted that the claims are directed to non-statutory subject matter. This rejection is traversed.

In response, claims 10 through 13 have been amended. The claimed subject matter is directed to a “a recording medium”, which is subject matter clearly encompassed by 35 U.S.C. § 101. Accordingly, withdrawal of the rejection of claims 10 through 13 under 35 U.S.C. § 101 is solicited.

Claims 1 through 13 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Olofsson.

This rejection is traversed.

The factual determination of lack of novelty under 35 U.S.C. § 102 requires the identical disclosure in a single reference of each element of a claimed invention, such that the identically claimed invention is placed into the recognized possession of one having ordinary skill in the art. *Dayco Prods., Inc. v. Total Containment, Inc.* 329 F.3d 1358, 66 USPQ2d 1801 (Fed. Cir. 2003); *Crown Operations International Ltd. v. Solutia Inc.*, 289 F.3d 1367, 62 USPQ2d 1917

(*Fed. Cir. 2002*). There are significant differences between the claimed inventions and the base station apparatus, method and record medium disclosed by Olofsson that scotch the factual determination that Olofsson discloses a base station apparatus, method or recording medium identically corresponding to those claimed.

The independent claims, i.e., claims 1, 6 and 10, have been clarified that by reciting “a remaining period occurring between a planned change in the transmission rate and an end of the channel-allocated period” as a criterion for the change. No such feature is disclosed or suggested by Olofsson. Indeed, Olofsson merely refers to throughput as a criterion for change. Olofsson neither discloses nor suggests the use of the remaining period, as defined in the independent claims, as a criterion for the change.

The above argued fundamental difference between the claimed inventions and the base station, method and recording medium disclosed by Olofsson undermines the factual determination that Olofsson discloses a base station apparatus, method or recording medium identically corresponding to those claimed. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc.*, 976 F.2d 1559, 24 USPQ2d 1321 (*Fed. Cir. 1992*); *Kloster Speedsteel AB v. Crucible Inc.*, 793 F.2d 1565, 230 USPQ 81 (*Fed. Cir. 1986*). Applicant, therefore, submits that the imposed rejection of claims 1 through 13 under 35 U.S.C. § 102 for lack of novelty as evidenced by Olofsson is not factually viable and, hence, solicits withdrawal thereof.


Based upon the foregoing it should be it should be apparent that the imposed rejections have been overcome and that all pending claims are in condition for immediate allowance. Favorable consideration is, therefore, solicited.

Application No.: 10/849,057

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 500417 and please credit any excess fees to such deposit account.

Respectfully submitted,

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